In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017

MIKE GRAVEL, UNITED STATES SENATOR
PETITIONER,

v.

UNITED STATES
RESPONDENT.

No. 71-1026

UNITED STATES
PETITIONER,

v.

MIKE GRAVEL, UNITED STATES SENATOR
RESPONDENT.

BRIEF OF UNITARIAN UNIVERSALIST ASSOCIATION, AMICUS CURIAE

HENRY PAUL MONAGHAN
765 Commonwealth Ave.
Boston, Massachusetts

FRANK B. FREDERICK
WILLIAM B. DUFFY, JR.
JOHNSON, CLAPP, STONE & JONES
One Boston Place
Boston, Massachusetts 02108

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Interest of Amicus	1
Argument	3
Point I. Private Publication by Senator Gravel is protected from inquiry by the Grand Jury	4
A. The opinion of the Court of Appeals	4
B. The Realities of Separation of Power	13
Point II. The protection of the speech and debate clause extends to Congressional employees	16
Point III. Beacon Press Cannot be interrogated concerning Senator Gravel's Dealings with it in connection with his private publication of the Pentagon Papers	21
A. The decision of the Court of Appeals	21
B. The Government's Position	24
C. The scope and protection for private parties	25
D. The decisions of this Court	28
Point IV. A common law privilege exists for Beacon Press protecting it from interrogation by the Grand Jury	30
A. The necessity for a privilege	30
B. The power to fashion a privilege	31
Conclusion	33

Table of Citations

Cases

Anderson v. *Dunn*, 6 Wheat. 204	17, 19, 28
Ansara v. *Eastland*, 442 F.2d 751 (D.C. Cir. 1971)	21
Atlee v. *Nixon*, —— F. Supp. —— (D. Penn. 1972) 40 L.W. 2472	21
Banco Nacional De Cuba v. *Sabatino*, 376 U.S. 398	32

Page

Barr v. *Mateo*, 360 U.S. 564 ..... 8, 20, 32

Bivens v. *Six Unnamed Narcotics Agents*, —— F.2d —— (2 Cir. 1972), 40 L.W. 2608, on remand from 403 U.S. 388 32

Bond v. *Floyd*, 385 U.S. 116 12

Coffin v. *Coffin*, 4 Mass. 1 (1808) 6, 10

Davis v. *Ichord*, 442 F.2d 1207 (D.C. Cir. 1970) 21

Doe v. *McMillan*, No. 71-1027, —— F.2d —— (D.C. Cir. 1972) cert. den. —— U.S. —— 19, 20, 21, 27, 31

Dombrowski v. *Eastland*, 387 U.S. 82 ..... 6, 17, 19, 20, 21, 27, 28, 29, 33

Eric v. *Tompkins*, 304 U.S. 64 31

Harper v. *Board of Elections*, 383 U.S. 663 11

Hentoff v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970) 27

Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 11

Katzenbach v. *Morgan*, 384 U.S. 641 ..... 7, 30

Kilbourn v. *Thompson*, 103 U.S. 168 ..... 4, 5, 6, 17, 19, 20, 21, 28, 29

Long v. *Ansell*, 69 F.2d 386 (D.C. Cir. 1934), aff'd 293 U.S. 76 25

Lyon's Case, Case No. 8, 646, 15 Fed. Cas. 1183 (C.C. D. Vt. 1798) 12

McCulloch v. *Maryland*, 4 Wheat. 316 ..... 10, 11

McGovern v. *Martz*, 182 F. Supp. 343 (D.C. Dist. Col. 1960) 25

Missouri v. *Holland*, 252 U.S. 416 11

Munn v. *Illinois*, 94 U.S. 113 16

New York Times v. *Sullivan*, 376 U.S. 254 8

Pierson v. *Rey*, 386 U.S. 547 32

Powell v. *McCormack*, 395 U.S. 486 ..... 5, 6, 10, 12, 21, 23, 25, 28

South Carolina v. *Katzenbach*, 383 U.S. 301 21

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 32

Page

Stamler v. *Willis*, 415 F.2d 1365 (7 Cir. 1969), cert. den. 399 U.S. 929 21

Tenney v. *Brandhove*, 341 U.S. 367 ..... 5, 7, 10, 12, 16, 24, 32, 33

Time, Inc. v. *Pape*, 401 U.S. 279 31

Township of River Vale v. *Town of Orangetown*, 403 F.2d 684 (2 Cir. 1968) 21

United States v. *Brewster*, No. 71-15 .... 12, 15, 25, 29, 30

United States v. *Johnson*, 383 U.S. 169 ..... 5, 7, 10, 11, 12, 14, 22, 23, 28, 29

United States v. *New York Times*, 403 U.S. 713 .... 14, 15

United States v. *Robinson*, No. 71-1058, —— F.2d —— (5 Cir. 1972) 19

Wason v. *Walters*, L.R. 4 Q.B. 73 (1868) 26

Statutes and Constitutional Provisions

U.S. Constitution, Art. 1, § 6 ..... 3, 16

42 U.S.C. 1983 32

Miscellaneous

Bibb and Davidson, *On Capitol Hill*, (Holt Reinhart & Winslow, 1967) 9, 18

Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955) 11

R. Bolling, *House Out of Order* (E.P. Dutton Co. 1965) 13

Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate*, 2 Suffolk U.L.R. 34 (1968) 10, 11

Clapp, *The Congressman: His Work as He Sees It* (The Brookings Institute, 1965) 9

Clarke, *Parliamentary Privilege in the American Colonies*, 181 (1943) 15

Congr. Rec. (March 22, 1972) (daily ed.) S. 4613-4623 16

Page

S. 4614 ..... 7, 10
S. 4616 15
S. 4621 27
Congr. Rec. (March 23, 1972) (daily ed.)
S. 4721-4735 16
S. 4726 18
S. 4724 19
117 Cong. Rec. E 6356-60 15
117 Cong. Rec. E 67-3-06 15
Cox, *The Role of Congress In Constitutional Determinations,* 40 University of Cincinnati Law Review 199 30
Friendly, *In Praise of Erie—and the New Federal Common Law,* 39 N.Y.U.L. Rev. 383 (1964) 32
Hauser, *Congressional Reform,* 47 N.D. Lawyer 442 ..... 14, 15, 18
Hauser, *The Congressmen's Conception of His Role* (Hennage Lithograph, 1963) 9
Hill, *The Erie Doctrine in Bankruptcy,* 66 Harv. L. Rev. 1013 32
Kofmehl, *Professional Staffs of Congress* (Purdue Research Foundation 1962) 19
Kurland, *The Impotence of Reticence,* 1968 Duke L. J. 619 14
Luce, *Legislative Assemblies,* Ch. 13 (Houghton Miffin Co. 1924) 29
Monagham, *Presidential War-Making,* 50 B.U. L. 19 14
Neal, *The Commons' Privilege of Free Speech in Parliament,* in Tudor Studies (Seton-Watson ed. 1924) 11
Report from the Select Committee on the Official Secrets Act (1939) 26
Wilson, *Congressional Government,* 297 (1885) 13, 14
Works of Thomas Jefferson, Vol. 8 (Ford ed.) 12
1 Works of James Wilson 421 (McCloskey ed. 1967) 12
4 Writings of James Madison 221 11

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017

MIKE GRAVEL, UNITED STATES SENATOR
PETITIONER,

v.

UNITED STATES
RESPONDENT.

No. 71-1026

UNITED STATES
PETITIONER,

v.

MIKE GRAVEL, UNITED STATES SENATOR
RESPONDENT.

BRIEF OF UNITARIAN UNIVERSALIST ASSOCIATION, AMICUS CURIAE

Interest of Amicus

This brief is filed with the consent of the parties; it is submitted because, as will appear, the amicus has a direct and substantial interest in the outcome of this litigation.

Despite its interest, however, the amicus has no desire to burden this court with a brief which simply rehearses matters fully discussed by the parties. Accordingly, the amicus will endeavor to make its points with as much economy as possible.

The opinions below, jurisdiction of this court, questions presented, constitutional provisions involved, and statements of the case are adequately presented by the parties to this litigation; accordingly, they are omitted here. So far as pertains to this amicus, we invite the court's attention to the following facts. The amicus is a religious association established more than 200 years ago and incorporated under the laws of The Commonwealth of Massachusetts. Beacon Press is a division of the association and is subject to its direction and control. In its opinion of January 7, 1972, the court of appeals said:

> "We would hold, if this appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to [Senator Gravel] or others in connection with the [Pentagon] Papers subsequent to their introduction into the subcommittee records." (App.)[1]

Thereafter, on January 11, 1972, the government served a grand jury subpoena on Gobin Stair, the director of Beacon Press and a second subpoena on him as custodian of the records calling for the production of all Beacon records pertaining to the Pentagon Papers publication. While these

[1] To be sure, the court of appeals subsequently noted that the amicus was not bound by the language in the opinion since Beacon Press was not a party to the case. While technically accurate, of course, the court's response is unconvincing. It is evident that the court's language reflects its considered judgment and would be adhered to in any further proceeding.

subpoenas have been withdrawn, the government, in papers filed in *Unitarian Universalist Association* v. *Joseph L. Tauro, et al.*, (D. Mass., No. 72-136-C), a related proceeding, said that "... identification of the participants in the transaction whereby the 'Pentagon Papers' were obtained and published by Beacon Press *is* sought, along with the details of such transactions."[2] The interest of the amicus is, therefore evident.

Argument

After concluding that the speech and debate clause[3] necessarily insulated Senator Gravel from any inquiry into his publication in congress of the "Pentagon Papers and his prepublication activity in connection therewith—holdings not challenged by the government here—the court of appeals held that:

1. The clause did not prohibit grand jury inquiry into Senator Gravel's *subsequent* publication of the papers through Beacon Press, although the court *tentatively* accorded him a common law privilege against further interrogation (but not necessarily criminal liability) on that matter (App. p.). That holding is not directly challenged by the government in No. 71-1026 because it disclaims any intention of calling the senator. Nonetheless, the correctness of the holding is necessarily before this court because of its relationship to Senator Gravel's claim that his conduct cannot be inquired of through his legislative assistant or Beacon Press.

2. The immunity afforded by the speech and debate clause to the senator includes a prohibition against interrogation of his legislative assistant, Dr. Leonard S. Rodberg,

---

[2] Emphasis supplied throughout this brief unless otherwise specifically indicated.

[3] "[F]or any Speech or Debate they [Senators and Representatives] shall not be questioned in any other place." U. S. Const. art. 1, § 6.

in connection with his work for the senator. (App. p.) That holding is challenged by the government.

3. The speech and debate clause does not prohibit grand jury interrogation of private persons about their dealings with Senator Gravel concerning his publication of the Pentagon Papers—except where the "object [of the inquiry] is to attack the legislator's motives in speaking" (App. p.). That holding is challenged by the government as too broad, and by Senator Gravel and this amicus as too narrow.

The amicus will show that the court of appeals incorrectly abridged Senator Gravel's rights under the speech and debate clause by holding that Beacon Press could be interrogated about its dealings with Senator Gravel in connection with his publication of the Pentagon Papers. In so doing, the amicus will establish the following propositions: (a) that Senator Gravel's private publication is protected from grand jury inquiry by the speech and debate clause or by a common law privilege [Point I]; and (b), Senator Gravel's privilege means that his conduct cannot be inquired of through the interrogation of his legislative assistant or Beacon Press. [Points II and III, infra.]

Point I. Private Publication by Senater Gravel Is Protected From Inquiry by the Grand Jury.

A. *The Opinion of The Court of Appeals.*

The court of appeals recognized that the protection afforded by the speech and debate clause extends beyond simply insulating the senator from inquiry concerning any documents he introduced into congress. At least since *Kilbourn v. Thompson*, 103 U.S. 168, 204, it has been settled that the protection of the clause extends to all "things generally done ... in relation to the business before [con-

gress]." See generally, *Powell* v. *McCormack*, 395 U.S. 486, 501-506. See also *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (clause protects conduct "in the sphere of legitimate legislative activity"); *United States* v. *Johnson*, 383 U.S. 169, 172 (clause includes all conduct "related to the due functioning of the legislative process"). Nonetheless, despite these decisions and this court's admonition that "the privilege should be read broadly,"[4] the court of appeals gave the clause an extremely narrow scope. The clause, it said, protects only one category of "things generally done" in congress, namely, things "generally done" in relation to congressional deliberations. "Our courts," said Judge Aldrich, "have expanded the privilege beyond the act of debating within congress . . . only when necessary to prevent indirect impairment of such deliberations" (App. p. .). This position, in turn, led the court to reject the senator's claim that his subsequent private publication of speeches made in or documents submitted to congress is protected by the clause.

The court of appeals was wrong in concluding that a senator's private publication was not protected, *even assuming its narrow conception of the clause*. What is more, the court's restrictive reading of the clause is inconsistent with its history and purpose, as well as the decisions of this court.

1. The court of appeals' conclusion that the clause protects actions taken by a legislator "beyond the act of debating within Congress . . . only when necessary *to prevent indirect impairment of such deliberations*" finds no support in the decision of this court. Perhaps the result in *United States* v. *Johnson, supra*, could be rationalized in those terms. But, surely, it is a remarkable *tour de force* to set *Kilbourn* v. *Thompson, supra*; *Tenney* v. *Brandhove*,

---

[4] *United States* v. *Johnson*, 383 U.S. 169, 179.

supra; Dombrowski v. *Eastland*, 387 U.S. 82 and *Powell* v. *McCormack, supra,* into that mold. Those cases, all of which extend the protection of the clause to legislative conduct unconnected with "the act of debating within Congress", can be viewed as an "indirect impairment" of debating only by a Pickwickian use of language. Moreover, if they are examples of "indirect impairment" of "debating", it passes understanding why executive infringement of a senator's prerogative of private publication does not constitute an even clearer case of "indirect impairment."

The scope of the speech and debate clause has been stated in terms which bear little resemblance to the language of the court below. In *Kilbourn* this court recognized that it "would be a narrow view of the constitutional provision to limit it to words spoken in debate" (103 U.S. at 204; see also *Powell,* 395 U.S. at 502). In rejecting such a narrow view *Kilbourn* relied upon *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808) — "perhaps the most authoritative case in this country on the construction of the privilege," (id. at 204)—where Chief Justice Parsons wrote:

> • • • [T]he article ought not to be construed strictly, but liberally that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without enquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this

privilege when not within the walls of the representatives' chamber.

See also *Tenney* v. *Brandhove*, 341 U.S. 367, 374.

We submit that, in the twentieth century operation of the legislative process, there can be no room for doubt that the subsequent publication of documents laid before congress is an "exercise of the functions of the office" of a United States senator.

2. The court of appeals nowhere purports to demonstrate why the subsequent private publication of documents introduced into congress is not, in the court's language, "necessary to prevent indirect impairment of [congressional] deliberations." The court simply assumes that private publication will not have any effect on *future* congressional deliberations. That assumption is, on its face, highly vulnerable; congress is, after all, an ongoing body, and it would seem apparent that private publication by a United States senator represents one method of affecting future congressional deliberations. See, for example, the remarks of Senator Ervin in Congr. Rec. S 4614 col. 3, (March 22, 1972) (daily ed.). But the difficulty with the court's assumption is much more basic. The court's willingness to make *any* assumption about the effect of private publication on future congressional deliberations requires a degree of judicial superintendence of the legislative process which is wholly at odds with the doctrine of separation of power. It is for congress, not the court of appeals, to determine whether a senator's private publication of congressional documents will further future congressional deliberations.[5]

---

[5] See *United States* v. *Johnson*, *supra*, 383 U.S. at 185, where the court recognized that the question of the reach of the speech and debate clause would have been substantially affected by a congressional judgment that certain conduct was *not* protected by the clause. Cf. *Katzenbach* v. *Morgan*, 384 U.S. 641, 656.

3. It is interesting to observe that the court below nowhere denies that private publication can aid future congressional deliberations. Rather, the court simply opines that such a claim "proves too much," because it would extend the protection of the clause to any speech made outside congress, at least if it had been previously delivered in congress. That possibility is brushed aside with the observation that "we do not believe [petitioner] has struck gold in a field previously thought to be barren" (App. p.). We would have supposed that more than an *ipse dixit* was required to dispose of a claim made by a United States senator. Moreover, the court of appeals never explains why subordinate executive officials are given an absolute common law privilege for their statements so long as they are made "within the outer perimeter" of their offices, *Barr* v. *Mateo*, 360 U.S. 564, 575,[6] but a United States senator is not entitled to similar protection when he relies upon a specific constitutional provision. Nor does the court explain why, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270), congressional speeches repeated outside of congress, would not be protected entirely apart from the strictures of the speech and debate clause.

4. The infirmity in the court of appeals' position is further demonstrated by its concessions. It conceded that some kinds of publications were protected by the clause: petitioner could claim protection with respect to "republication such as in the news media or the congressional record, which is the *natural consequence of a speech* and is necessarily protected" (App. p.). Surely, the conclusion that one category of subsequent publication — by news-

[6] In *Barr* v. *Mateo*, this court held that, in a libel action, the utterances of a federal official were absolutely privileged so long as they were made "within the outer perimeter" of his official duties.

paper — is a "natural consequence" of speech, but that other closely similar categories of publication — by book, etc. — are not, is wholly question begging, particularly so given the court's further concession that, in fact, the latter type of publication "may be customarily done by members of Congress" (App. p.). The court below was surely correct in its view that members of congress spend considerable time in various forms (e.g., radio, television, newsletters, etc.) of publication of their views. E.g., Hauser, *The Congressmen's Conception of His Role,* 59 (Hennage Lithograph, 1963); Clapp, *The Congressman: His Work as He Sees It,* 100-101 (The Brookings Institute, 1965); Bibb and Davidson, *On Capitol Hill,* 13 (Holt, Reinhart & Winslow, 1967). If congressmen customarily engage in the private publication of their speeches why is that not a "natural consequence" of their speech?

In denying the petition for rehearing, the court of appeals sought to escape the foregoing difficulties by yet another formulation. The court suggested a distinction—

> "between normal and customary republication of a speech in Congress and republishing privately all part of 47 volumes of, we must presently assume, lawfully classified documents through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern."

(App. p.). This shift in analysis is striking. What is "customary" publication now becomes a function of a judicial determination of what is relevant to a congressional subcommittee, not whether the publication is done "privately." Plainly, any judicial assessment of what is "relevant" to a congressional committee intrudes a court far into the legislative process itself — an intrusion which, we believe, is in manifest conflict with time-sanctioned

principles of separation of powers. Not only is this difficulty ignored by the court of appeals, its new analysis is advanced without even a glancing reference to its earlier conclusion that the "privilege protects against a claim of irrelevancy" (App. p.). Compare *Coffin* v. *Coffin, supra. Tenney* v. *Brandhove, supra,* 341 U.S. at 374. See also remarks of Senator Ervin Congr. Rec. S 4614 col. 1 (March 22, 1972) (daily ed.).

5. Underlying these difficulties is the court's effort to confine the speech and debate clause to its narrowest historical setting. Like its predecessors in the English Bill of Rights, the Articles of Confederation and the state constitutions, the clause specifically prohibits executive sanctions for speeches made in the legislature. But, like the other provisions in a document "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," (*McCulloch* v. *Maryland,* 4 Wheat. 316, 415) the clause has a breadth and meaning which transcends the specific events which gave it birth. See *Powell* v. *McCormack,* 395 U.S. 486, 506. The clause "reinforce[s] the separation of powers so deliberately established by the Founders", and must, therefore, be "recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson,* 383 U.S. at 178. Not surprisingly, then, "the language of the Constitution is framed in the broadest terms" and it must be "read broadly" (Id. at 179, 182-83). This, in turn, means that the clause "cannot remain static if it is to remain meaningful."[7] Its precise contours are

[7] "In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded, or for that matter, even fifty years ago.... Modern legislatures have had to adopt [sic] their techniques of operation to the increasingly complex society within which they must function. New techniques and new

and have always been shaped by what is appropriately and "customarily" done in the legislative process of the day. E.g., Neale, *The Commons' Privilege of Free Speech in Parliament,* in Tudor Studies (Seton-Watson ed. 1924) at 164-165.[8] Accordingly, contemporary legislative practice, not seventeenth and eighteenth century history, measures what is "generally done . . . in relation to the business before [congress]." That result is, of course, consistent with our constitutional tradition. See *McCulloch* v. *Maryland, supra; Missouri* v. *Holland,* 252 U.S. 416, 433; *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 442-43; ["If . . . it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation."] *Harper* v. *Board of Elections,* 383 U.S. 663, 669; Bickel, *The Original Understanding and the Segregation Decision,* 69 Harv. L. Rev. 1, 59 (1955).

6. The court's effort to confine the speech and debate clause to its narrowest historical setting shows, moreover, that, on this occasion, the court was a bad historian. The speech and debate clause was adopted by the constitutional convention "without discussion and without opposition" largely because it was a familiar one, having existed in the Declarations of Rights, the Articles of Confederation and in various state constitutions. *United States* v. *Johnson, supra,* at 177. Plainly, therefore, the general import of the clause, if not all its details, was under-

---

methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain static if it is to remain meaningful." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate,* 2 Suffolk U.L.R. 34 (1968).

[8] As Madison observed, "difficulties and differences of opinion may arise" in applying the privilege to "emerging cases." However, in "deciding on these the reason and necessity of the privilege must guide" 4 *Writings of James Madison* 221.

stood by members of the constitutional convention. One might observe that the Framers recognized that the clause represented a crucial milestone in securing legislative independence from "prerogative rule." No longer could legislators be punished for speeches displeasing to the crown. *Tenney* v. *Brandhove, supra* at 372-75; *United States* v. *Johnson, supra* at 181-183. In addition, this country had less than a decade of experience under the new constitution when Vice President Jefferson pointed to the policies underlying the clause as a basis for a vigorous protest against a grand jury investigation of the conduct of certain congressmen in sending circulars to their constituents critical of administration policy toward France. *Works of Thomas Jefferson*, Vol. 8, 322-31 (Ford ed.). See also *Lyon's Case*, Case No. 8, 646, 15 Fed. Cas. 1183, particularly at 1190-91 (C.C.D. Vt. 1798).

Moreover, it seems clear that the clause's admittedly spare language was understood by the framers to protect not only a legislator's free and untrammeled participation in the legislative process, but also his duty to contribute to an enlightened electorate [9] — a point vigorously urged, we might add, by the government itself (Br. p. 19) in *United States* v. *Brewster*, No. 71-15. The court below failed to appreciate that the speech and debate clause "performs an important function in representative government." *Powell* v. *McCormack*, supra, at 503. And representative government presupposes that a legislator may communicate with his constituents and the country at large, as well as with his colleagues. *Bond* v. *Floyd*, 385 U.S. 116, 136 ("Legislators have an obligation to take

---

[9] Thus both the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 *explicitly* tied the protection of their clauses to that of the "rights of the people." See *Tenney* v. *Brandhove*, 341 U.S. 367, 373-74. See also, for example, 1 *Works of James Wilson*, 421-22 (McCloskey ed. 1967).

positions on controversial political questions so that their constitutents can be fully informed by them." See Wilson, *Congressional Government*, 297 (1885). As Harold Laski observed, the legislature "provides a process of public education which is pivotal to democratic government." *The American Presidency*, quoted in R. Bolling, *House Out of Order*, 29 (E. P. Dutton Co. 1965).

7. Finally, even assuming the court of appeals' reading of history, we think it evident that the clause protects petitioner's publication of the Pentagon Papers. For we have here little more than ancient problems in a twentieth century context: the executive still seeks to intimidate and discipline members of the legislature for conduct which casts aspersions upon the executive's handling of a matter of overriding national interest. The only difference between this effort and that of earlier times is that techniques more appropriate to our age, interrogation, harassment and exposure, have been substituted for the ancient devices of arrest and imprisonment.[10]

B. *The Realities of Separation of Power.*

As we have shown, the effort by the court of appeals to deny the protection of the speech and debate clause to a senator's subsequent publication of documents introduced in congress will not withstand scrutiny either analytically or historically. What is more, the court's holding wholly ignores the real nature of the separation of powers issues involved here. This case presents a sharp conflict between the executive and a member of congress. The claim for protection of legislative independence here is an extremely powerful one, far more imposing indeed than if it had been made in 1789. The separation of powers prescribed by

[10] It is well worth noting here that the court below did not in fact rule out criminal prosecution for petitioner. (App. pp.)

the constitution admits of considerable fluidity in terms of the actual powers exercised at any time by each branch of the government. See, for example, Monaghan, *Presidential War-Making*; 50 B.U.L. 19, 24-25. The twentieth century has witnessed a vast accretion of power in the executive branch at the expense of the legislative branch. Monaghan, *supra*. At least since 1932 we have, perhaps irreversibly, entered into an era of "presidential government," as Professor Kurland rightly observes.[11] And in no area is presidential dominance more clear than in foreign affairs.[12]

These realities must be kept in mind in assessing the scope of the protection currently afforded by the speech and debate clause. If the goal of preserving the integrity of the legislative branch (*United States* v. *Johnson*) is to be achieved, the legal principles must take into account the actual distribution of power between the two branches of government. So understood, there is no basis for the grudging approach to the clause displayed in the court below. Any such view is, we might add, particularly inappropriate when sweeping claims of presidential prerogatives in foreign affairs are joined with equally sweeping claims of executive privilege in favor of secrecy.[13] A prime factor in the decline of congressional effectiveness is its inability to obtain information (Hauser, *Congressional Reform*, 47 N.D. Lawyer 442, 452-463), and "the most

---

[11] Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 727-28. Burns, *Presidential Government*, (1965). Compare Woodrow Wilson, *Congressional Government* (1885).

[12] For a defense of these presidential prerogatives by one of counsel for amicus which is *not* shared by the amicus itself, see Monaghan, *Presidential War-Making*, *supra*.

[13] Cf. *United States* v. *New York Times*, 403 U.S. 713; see also President Nixon's persistent refusals to permit Dr. Henry Kissinger to testify before congress. One would think that the very fact of presidential dominance in the area of foreign affairs would be the strongest argument *against* wide ranging claims of executive secrecy in that area! See also Hauser, *supra*, at 460.

striking feature of the [congressional] information system . . . is its heavy dependence on the President . . . (Id. at 454)." See also remarks of Senator Mathais, Congr. Rec. S. 4616, col. 3 (March 22, 1972) (daily ed.). Surely, something in our framework of government is askew when members of congress feel compelled to intervene in the "New York Times case" so as not to be deprived of information about governmental policy in Vietnam.[14]

Here the executive has failed to maintain effective security over documents originally in its possession. Failing to keep its own house in order (Stewart, J. concurring in *New York Times* v. *United States*, 403 U.S. 713, 728-29), it now seeks to discipline a member of congress for his exposure of its conduct. The core question in this case turns on its right to do so. We think that the publication of documents by a congressman is a matter for congress, not for the executive or the courts. It is one thing for congress to lay down rules with respect to the publication of documents and to enforce those rules against its members.[15] (Indeed in *United States* v. *Brewster*, No. 71-15, the government's brief (pp. 12-24) spends considerable time in demonstrating that congress can discipline its own members, and of special pertinence here the government details instances (Br. p. 18 n. 16) in which colonial legislatures imposed sanctions upon their own members for the unauthorized disclosure of documents. See Clarke, *Parliamentary Privilege in the American Colonies*, 181-82 (1943). But Senator Gravel's conduct is a matter of scrutiny for congress alone; he "shall not be questioned in

[14] The briefs filed by members of congress in the lower federal court, *United States* v. *Washington Post*, decided with *United States* v. *New York Times Company*, *supra*, is printed 117 Cong. Rec. E 6356-60, see also Brief of 27 Members of Congress as *Amicus Curiae* in *New York Times* case, printed at 117 Cong. Rec. E 67-3-06.

[15] We do not mean that the rules are necessarily valid, only that the issue would be far different than that presently before this court.

any *other* Place." See generally Congr. Rec. S 4613-4623 (March 22, 1972) (daily ed.); id. S 4721-4735 (March 23, 1972) (daily ed.). The only restraints imposed upon members of congress, therefore, stem from the legislative process itself (U.S. Const. art. 5) or from the electoral process. "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses" *Tenney* v. *Brandhove*, 341 U.S. 367, 378, a result which of course is entirely consistent with underlying assumptions of our policy. Cf. *Munn* v. *Illinois*, 94 U.S. 113, 134 ["For protection against abuses by legislatures the people must resort to the polls, not to the courts"].

POINT II. THE PROTECTION OF THE SPEECH AND DEBATE CLAUSE EXTENDS TO CONGRESSIONAL EMPLOYEES.

The court of appeals had no difficulty in concluding that the protection afforded by the speech and debate clause to "Senators and Representatives" necessarily embraced at least their legislative assistants. "It is not only accepted practice," said Judge Aldrich, "but we would think indispensible, for a legislator to have personal aides in whom he reposes personal confidence." The government's petition for certiorari (No. 71-1026, p. 13) urges that this was error, that the protection of the clause "should not be broadly extended to legislative aides, who are subject neither to the judgment of the electorate nor to the imposition of criminal penalties or [congressional] discipline." The government asserts that protection should be extended "only in those unusual situations where the activities of the legislative aide *are closely and directly related to the actual performance of the legislator's speech or debate.*"

It is unclear what limits the government has in mind. The suggestion seems to be that the clause protects a

senator against interrogation of his legislative assistants only where the legislator himself is engaged in "speaking or debating." We do not understand the logic of such a position. As has been shown, "speaking or debating" is only *one* instance of the protection afforded by the clause to the legislator himself; a legislator is protected by the clause in his voting, committee work, etc. We cannot comprehend why, if the clause extends to legislative assistants at all, they share in the protection only in one category. Moreover, this court has expressly recognized that the immunity of the clause may extend to congressional employees in situations which do not conceivably fit the government's formula. *Kilbourn* v. *Thompson*, 103 U.S. 168 and *Dombrowski* v. *Eastland*, 387 U.S. 82, 85, both recognize that protection for congressional employees might exist in situations not involving "speech" by the legislator. [The reason for ultimately denying protection to the congressional employees in *Kilbourn* was not an *a priori* judicial determination not to protect congressional employees but because the legislative conduct in that case invaded constitutionally protected individuals rights. See 20-21, *infra*. Compare *Anderson* v. *Dunn*, 6 Wheat. 204, distinguished in *Kilbourn* (103 U.S. at 196-197), protecting congressional employees under the clause for a congressionally authorized arrest.]

The government's restrictive reading of the clause has little to commend it.[16] Emphasizing the importance of

[16] The government's assertion that legislative aides are not subject to either criminal penalties or congressional discipline is, we think, wholly unsound. As we shall show, they have less protection than the senators and representatives themselves. We are not faced here with a criminal statute sought to be applied to a legislative assistant; nor are we faced with the validity of disciplinary action taken by the senate. *Kilbourn* v. *Thompson*, relied upon by the government, surely does not foreclose the latter possibility. It holds only that our jurisprudence has not taken over the whole body of the *lex et*

grand jury investigations provides no sufficient reason for, as Senator Ervin observes, it is not apparent why one should "place a higher value on the function of a grand jury . . . than upon the duty of a legislator to legislate for the interests of 200 million people in the United States . . ." Congr. Rec. S 4726 col. 3 (March 23, 1972) (daily ed.). The focus must, therefore, be upon the legislative process, not the needs of the grand jury. And the central fact of twentieth century legislative process is its staggering complexity:[17]

> "The legislative giants of the 19th century — the Clays, Calhouns and Websters — could afford to devote a whole generation or more to refining and debating the few great controversies of the Republic. The contemporary legislator cannot take such a leisurely approach; he finds himself beset daily by a staggering number and range of public problems, both large and small." Bibby and Davidson, *On Capitol Hill — Studies in the Legislative Process,* 260 (New York: Holt, Rinehart and Winston, Inc. 1967).

It is, accordingly, surely apparent that a senator could not possibly function without the assistance of an adequate staff. For constitutional purposes, "the aide and the legislator [must be] treated as one," as the court of appeals correctly recognized. Were it otherwise, a senator "could

---

consuetudo parliamenti — a body of English law which gave Parliament almost unlimited power to punish anyone for offenses to its dignity. There was no suggestion that the senate was without power to impose discipline on its own employees.

[17] The First Congress saw a budget of 4.3 million dollars, and 144 bills were introduced. By contrast, the Ninety-First Congress generated 210.3 billion dollars in expenditures and had to deal with 25,215 measures! Hauser, *Congressional Reform*, 47 N.D. Lawyer 442, 444 (1972).

not possibly function for a single day" as Senator Ervin recently observed. Congr. Rec. S 4724 col. 3 (March 23, 1972) (daily ed.). See generally Kofmehl, *Professional Staffs of Congress* (Purdue Research Foundation 1962). The government, it should be noted, recognizes in another context the importance of recognizing that government officials must perform through subordinates. In support of a petition for rehearing in *United States* v. *Robinson*, No. 71-1058 —— F.2d —— (5 Cir. 1972), the government, *citing the decision of the court below*, said (p. 2): "The practice of having a personal aid in whom an official must and does repose total confidence is well-known and widely accepted, not only in the executive branch as well [citations]. The nature of such a relationship demands that the aid and the officer be treated as one." For some reason, not here explained, the government assumes a flatly contrary stance.

In one respect, however, the reasoning of the court below may mislead. It might be taken to suggest that the clause protects only some kinds of congressional employees, e.g., "personal aides." That is not the case. *All* congressional employees, be they the sergeant-at-arms (*Anderson, Kilbourn*) or committee counsel (*Eastland*) are, in appropriate circumstances, covered by the clause. See the discussion in *Dombrowski* v. *Eastland*, 387 U.S. 82, 85. The reason is evident: the complexity of government requires that a senator act through numerous assistants who perform many and varied tasks, all of which are necessary to the proper and effective functioning of congress. Accordingly, there is no reason to differentiate among congressional employees so far as the protection afforded to a senator by the clause is concerned. As the court of appeals in *Doe* v. *McMillan*, No. 71-1027 — F.2d — (D.C. Cir. 1972) cert. den. — U.S. — recognized:

> "In this day of complex public problems, where assignment of authority by legislators to legislative assistants is an absolute necessity if Congress is to be able to perform its constitutional functions, it would indeed be hollow to afford immunity to the Congressmen, but not to their assistants, for these aides might be hesitant to undertake the full performance of their lawful duties if they had to face the threat of possible lawsuits. Such an inconsistent result would impossibly hinder congressional activities, and effectively prevent the attainment of the objectives underlying the Speech or Debate Clause. We therefore must conclude that the suit against the Federal legislative employees was properly dismissed due to their legislative immunity." (p. 18)

McMillan is supported by the language of this court in *Barr* v. *Mateo*, 360 U.S. 564, 572-73, recognizing that "the complexities and magnitude of governmental action have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the Executive hierarchy."

We would not be understood, however, as saying that the protection of congressional employees is identical to that of "senators" and representatives themselves. An unbroken line of decisions in this court, extending from *Kilbourn* v. *Thompson*, forecloses any such argument. E.g., *Dombrowski* v. *Eastland*, supra, at 85. *Powell* v. *McCormack*, 395 U.S. at 504. Where the legislator's action results in the *deprivation of individual rights secured by the constitution of the United States*, it is doubtful whether congressional employees are protected at all. *Kilbourn* v. *Thompson*, (103 U.S. at 196 et seq.) appears to settle that point:

Thus congressional employees may be subjected to both damages (*Kilbourn, Eastland*) and to injunctive orders (*Powell*) in situations of that character. E.g., *Stamler* v. *Willis*, 415 F.2d 1365, 1368 (7 Cir. 1969), cert. den. 399 U.S. 929. However, a member of congress could not be made to respond in damages (*Kilbourn* v. *Thompson*; *Dombrowski* v. *Eastland*), nor, ordinarily, to an equity decree (*Powell*).[18]

The fact that congressional employees may not be accorded the same protection as "Senators and Representatives" where congressional action has invaded individually protected rights is no assistance to the government here, of course. The liberties protected by the due process clause and other constitutional provisions do not run to governmental units. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24. Cf. *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684, 686 (2 Cir. 1968). And there is no claim here that Senator Gravel or Beacon Press have invaded any individual rights. Compare *Doe* v. *McMillan*.

POINT III. BEACON PRESS CANNOT BE INTERROGATED CONCERNING SENATOR GRAVEL'S DEALINGS WITH IT IN CONNECTION WITH HIS PRIVATE PUBLICATION OF THE PENTAGON PAPERS.

A. *The Decision of the Court of Appeals.*

The court of appeals restricted the protection of the speech and debate clause in a manner of crucial significance

[18] It is possible that in appropriate circumstances declaratory and injunctive relief might be permitted to vindicate individually secured constitutional rights. *Powell* v. *McCormack*, 395 U.S. at 506, n. 26, expressly leaves that issue open. *Atlee* v. *Nixon*, ___ F. Supp. ___ (D. Penn. 1972) 40 L.W. 2472. Cf. *Davis* v. *Ichord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara* v. *Eastland*, 442 F.2d 751 (D.C. Cir. 1971).

here. Inquiry of private parties concerning Senator Gravel's publication of the Pentagon Papers was not barred by the clause it said unless (citing *Johnson*) "the object [of the inquiry] is to attack the legislator's motives in speaking" (App. p.):

> "With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with the intervenor or his aides . . . [we] hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech. . . ."

The importance of this holding cannot be underestimated. It is evident that, given the complexity of modern government, any legislator will and must frequently act in cooperation with or through private parties (as well as congressional employees) in the discharge of his functions. Simply put, this is a necessary and "customary" aspect of the functioning of the legislative process in the twentieth century. Accordingly, even the narrow protection afforded by the clause under the holding of the court of appeals is, on analysis, illusory: wherever the clause shields a senator

from direct inquiry,[19] his conduct can still be inquired of through interrogation of any private parties with whom he dealt. Surely, this result cannot be rationalized in terms of the underlying purpose of the clause. Direct interrogation of the legislator is barred by the clause, said the court of appeals, in order to prevent "[i]ntimidation . . . harassment, embarrassment" resulting from exposure (App. p.). Yet the court below was willing to countenance precisely the same evils so long as they took a different form —so long as the interrogation is not of the senator but of the third parties with whom he dealt. But quite clearly the only difference is the point at which the executive pressure is laid, not the end result. See *Powell* v. *McCormack, supra*, 395 U.S. at 505. And the end result of allowing unlimited inquiry either of the legislator or of third parties necessarily must be either to intimidate the legislator in the discharge of his constitutional functions, and/or to intimidate those private persons with whom he would deal.

The court of appeals, however, thought that a legislator's rights are adequately secured so long as private party inquiry is prohibited where its "object is to attack the legislator's motives in speaking" (App. p. 12). It is difficult to see what relevance this limitation could have here since Senator Gravel's private contacts occurred after he placed the Pentagon Papers before congress. More fundamentally, however, in the context of this problem (compare *United States* v. *Johnson, supra*), the suggested standard lacks meaning, as the government itself expressly recognizes in its petition for certiorari (p. 12). By what criteria could a court determine whether "the" object of a grand jury interrogation of Beacon Press concerning Senator Gravel's

[19] For example, under the court of appeals' view, Senator Gravel could not be interrogated by the grand jury concerning his preparation for and placing of the Pentagon Papers before the senate.

publication of the Pentagon Papers was to "attack" his motives in speaking?[20] See *Tenney* v. *Brandhove*, 341 U.S. 367, 377. Finally, we do not understand why the protection of the clause should depend upon "the object" of the interrogator? The injury done to the legislator in no significant way depends upon a resolution of that elusive element.

B. *The Government's Position*

The government agrees that the court of appeals' analysis is unsound. The government, however, urges (p. 10) that the clause affords *no* protection to a senator against interrogation of private parties. "[*C*]*onceivably,*" it admits, "the grand jury testimony of [private] persons touching on the performance of legislative acts *might* embarrass or impune the motives of a legislator and *conceivably* that possibility might inhibit a congressman in performing his legislative activities." But, says the government, a "*hypothetical* hindrance of legislative activity . . . is of course of a different order from that which would occur if the legislator himself were [interrogated] . . . ." The key words in the government's argument are, or course, "conceivably," "might" and "hypothetical" — characterizations by which the government seeks to minimize the impact of interrogation of private persons on the legislator involved.

The government's argument will not withstand careful analysis. The sole *concrete* justification it offers in its petition for distinguishing between interrogation of a senator directly and of a private party with whom he dealt is contained in a single phrase. The senator's "own time is in no way being expended. Nor is he personally distracted in

[20] The test employed by the court assumes a simple and monistic conception of the interrogator's purpose. Quite clearly, however, the interrogation may be proceeding for multiple and complex reasons.

the performance of his legislative duties." (p. 11) The government is, of course, correct in recognizing that one function of the clause is to prevent waste of a legislator's time. See *Powell* v. *McCormack, supra,* 395 U.S. at 505. To that extent, there is, as the government contends, some difference between interrogation of third parties and of the senator himself. However, we do not undedstand why the government also believes that the "personal distraction" of a legislator is not substantially identical whether he is questioned about his dealings with x or x himself is subject to questioning on the same point. The government's psychological theory is by no means self-evident. See *Powell* v. *McCormack, supra,* at 505. In any event, what the government wholly ignores is that the *principal* function of the clause is to prevent not distraction, but intimidation and harassment of a legislator, a point which, incidentally, it fully recognizes in its brief (p. 20) in *United States* v. *Brewster*: "the immunity conferred by the clause was intended to prevent legislative intimidation by or accountability to other branches of government . . . Immunity from potential harassment whatever its form [is important."] It bears emphasis that freedom from executive intimidation is the core value protected by the clause. As we have shown (pp. 13-16) that threat is a real one, and in that regard nothing of substance turns on whether the interrogation is of the senator or of the parties of whom he dealt. The only difference is the point at which the executive pressure is focused.

C. *The Scope of the Protection for Private Parties.*

There is *dicta* in at least two decisions asserting that the protection of the clause does not extend to a legislator's dealings with private parties.[21] There is, however, authority

[21] *Long* v. *Ansell*, 69 F.2d 386 (D.C. Cir. 1934) aff'd. 293 U.S. 76; *McGovern* v. *Martz*, 182 F. Supp. 343 (D.C. Dist. Col. 1960).

recognizing protection for private parties for private publication of legislative speeches. The English decisions culminating in *Wason* v. *Walters*, L.R. 4 Q.B. 73 (1868), which are analyzed in *Report from the Select Committee on the Official Secrets Act* (1939), rest in part at least on such a premise. See *Walter, supra*, 4 Q.B. at 92-96. This court has never resolved the extent to which a senator's protection under the speech and debate clause extends to his dealing with private parties in either of two distinct situations: *first*, with respect to their legal accountability for action taken in conjunction with members of congress, an issue, which, of course, is not raised here;[22] *second*, and of grave importance here, the extent to which private parties can be interrogated concerning their dealings with a member of congress, *the direct inquiry of whom could not be undertaken.* That the questions of legal accountability and of interrogation are quite distinct was fully appreciated by the court below (App. p.). While the latter question is concededly an open one here, we think it evident that full protection for a legislator in the twentieth century necessarily includes protection for his dealings with private persons. Surely the protection of the clause does not depend, as the court of appeals' ruling would have it, on whether Senator Gravel publishes the material himself via his own xerox machine or he employs a private printer to do the same thing. Nor does it depend, as the court below also holds, on whether the New York Times prints the proceedings and documents before Senator Gravel's Committee rather than Beacon Press publishing them.

The court of appeals recognized that protection afforded by the clause to senators necessarily included protection of legislative assistants. But, as we have said, there is no reason to confine the clause to legislative assistants. "Se-

---

[22] The question would arise if Beacon Press were subjected to criminal prosecution for its publication of the Pentagon Papers.

nators'' and ''Representatives'' must act through a whole host of congressional employees. *Dombrowski* v. *Eastland*, 387 U.S. 82, 85. Accordingly, *Doe* v. *McMillan*, —— F.2d —— *supra*, correctly recognized that the clause protects not only members of congress but federal employees assisting them in publishing a congressional committee report. We submit that there are no relevant differences between Beacon Press and the federal employees in *McMillan*, particularly once it is conceded that private publication by members of congress is ''customary.'' To so hold would elevate form over substance. *So long as the private party performs functions analogous to those performed by congressional employees they too are protected to the same degree as the employees* — at least absent a congressional determination to the contrary. As Senator Ervin observed:

> ''A Senator has the right to seek the assistance of anyone in the performance and execution of the duties of his office. And he cannot be called upon to answer for the exercise of those duties by the examination of any of his assistants that he avails himself of.''

Congr. Rec. S 4621, col. 2 (March 22, 1972) (daily ed.). Here there are no relevant distinctions between Beacon Press and the government printer. See *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970). Surely, if congress abolished that position and thereby channeled all congressional publication to private printers the constitutional question — so far as the speech and debate clause is concerned — would be no different. The policies of the clause do not turn upon who pays the printer.

Moreover, even if private parties performing functions analogous to those performed by congressional employees are not protected by the clause there is solid reason for

recognizing that protection at least for private printers of congressional works. Private printers, unlike other private parties, play a unique role: historically much litigation has centered on efforts to prevent the press from publishing legislative proceedings and materials. See p. 12, *supra*. This is hardly surprising because the press permits a congressman to perform a most vital task — keeping his constituency and the public informed — and, as the government itself recognizes, historically the speech and debate clause was tied to ensuring an enlighted electorate. Thus should the government printer not publish the documents for lack of authority or funds, or any other reason, private printers can fill the gap.

D. *The Decisions of This Court.*

As we have observed earlier (pp. 20-21), we fully appreciate that the protection afforded to private parties is not co-extensive with those of the legislator. *Kilbourn* v. *Thompson, supra; Dombrowski* v. *Eastland,* 387 U.S. 82, 85; see also *United States* v. *Johnson.* But the cases are not dispositive of the extent to which third parties can be interrogated about their dealings with a senator concerning publication. In *Kilbourn* members of congress were held protected by the clause, but the congressional marshals were held responsible in damages for the execution of an unconstitutional legislative arrest order. See also *Dombrowski* v. *Eastland,* 387 U.S. 82, 85; *Powell* v. *McCormack,* 395 U.S. 486, 501-506. Thus in *Kilbourn,* the clause operated so as to protect legislators, but not third parties, from the consequences of unconstitutional action which deprived citizens of rights secured to them by the Constitution of the United States. *Kilbourn* expressly recognizes the point, distinguishing *Anderson* v. *Dunn,* 4 Wheat. 204, on that ground. See also *Powell* v. *McCormack, supra* at 503-504.

Here, by contrast, there is no claim that any citizen's constitutionally protected liberty has been abridged by the tortious conduct of private parties. See p. 21, *supra*. Moreover, here the crucial question does not turn on the legal accountability of Beacon Press (e.g., in a criminal case) for its conduct,[23] but on whether it can be interrogated about its dealings with Senator Gravel *in circumstances where he cannot be interrogated directly. Kilbourn* and its progeny are not even remotely relevant to that question.

Nor does *United States* v. *Johnson, supra,* implicitly recognize that private parties are wholly beyond the protection of the clause. It may very well be that under the clause those who attempt to bribe a senator may be prosecuted even though the senator himself escapes prosecution. Cf., *United States* v. *Brewster,* No. 71-15.[24] That, as we said, is because the protection afforded by the clause is not unitary—the clause protects congressional emlpoyees to a lesser extent than the senators and representatives themselves. *Dombrowski* v. *Eastland,* 387 U.S. 82, 85. But the crucial point is that, for the purposes of the clause, *there is no relevant distinction between a congressional employee and a private party performing essentially the same tasks.* If a prosecution would validly lie against a private party it would also lie against a congressional employee for the same conduct. See the discussion in note 16, at p. 17.

We submit that, given both the complexity of the modern governmental process and the dominant role of the president therein, the protection afforded by the speech and debate clause to a United States senator should extend not only to congressional employees who assist him but also to private parties performing similar tasks. This is, as we

---

[23] We, of course, do not concede that criminal sanctions could validly be imposed for that conduct.

[24] See also Luce, *Legislative Assemblies,* Ch. 13 (Houghton Mifflin Co. 1924).

have said, certainly true at least with respect to private printers. If the constitution shielded Senator Gravel's own publication[25] of the Pentagon Papers or his publication of the document through the public printer, we see no acceptable basis for denying a similar constitutional shield to his dealings with a private printer. Surely, this is in keeping with the great purpose of the clause. This court is, it should be noted, not faced with a legislative judgment that such protection of third parties is unnecessary. In such a case great weight would be accorded to the congressional determination of the meaning of a clause touching centrally upon its own legislative prerogatives. See *Katzenbach* v. *Morgan*, 384 U.S. 641, and Cox, *The Role Of Congress In Constitutional Determinations*, 40 University of Cincinnati Law Review 199. But see brief for appellees in *United States* v. *Brewster*, *supra*, at pp. 49-72.

POINT V. A COMMON LAW PRIVILEGE EXISTS FOR BEACON PRESS PROTECTING IT FROM INTERROGATION BY THE GRAND JURY

A. *The Necessity For A Privilege.*

The court of appeals concluded that neither Senator Gravel nor his legislative assistant were protected by the speech and debate clause from inquiry concerning the senator's private publication of the Pentagon Papers. However, apparently concerned with the unseemly character of a grand jury interrogation of a United States senator or his legislative assistant about the senator's decision to engage in private publication, the court held that both were protected from interrogation by a common law privilege.

Even if Senator Gravel could not invoke the protection of the speech and debate clause for Beacon Press, neither the court of appeals in its opinion nor the government in

[25] E.g., if Senator Gravel had his own printing press or a xerox machine.

its petition for certiorari explains why Senator Gravel's common law privilege does not include Beacon Press as well as the senator and his legislative assistant. Compare *Doe* v. *McMillan, supra,* where the court of appeals recognized a privilege for officials of the District of Columbia who supplied information for a report issued by a congressional committee.

Recognition that any common law privilege of Senator Gravel from interrogation embraces protection against interrogation of the printer with whom he dealt is, of course, supported by all the considerations described in Point IV in support of recognizing the constitutional character of Senator Gravel's claims re Beacon Press. We have no desire to burden this court with a repetition of those considerations. We earnestly submit, however, that whether they convince this court that they are of constitutional dimension, they are clearly weighty enough to support the privilege here claimed.[26] Surely, judicial recognition of privilege is appropriate for a printer who reproduces documents laid before congress by a United States Senator. Such a privilege, even if not constitutional dimension and therefore subject to legislative revision, makes meaningful Senator Gravel's prerogatives.

B. *The Power To Fashion A Privilege.*

There is, we think, no doubt that this court has power to fashion a privilege in these circumstances. *Erie* v. *Tompkins,* 304 U.S. 64, makes clear there is no general law-

[26] And such a privilege is particularly appropriate given common law willingness (in another context to be sure) of a privilege to printers to report public proceedings. Indeed, it seems to us that, independently of the speech and debate clause or any common law privilege, Beacon Press's activity in publishing the Pentagon Papers is protected under the first amendment. See, for example, *Time, Inc.* v. *Pape,* 401 U.S. 279.

making power in the federal courts. To the extent that this court fashions law, it is because "principles formulated by federal judicial law have been thought by this court to be necessary to protect uniquely federal interests ... [Of] course the federal interest granted in all these cases is one the ultimate statement of which is derived from a federal statute." *Banco Nacional De Cuba* v. *Sabatino,* 376 U.S. 398, 426. Or from the constitution itself *Sabatino,* 376 U.S. 427, at n.25.[27] *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205; Friendly, *In Praise of Erie — and the New Federal Common Law;* 39 N.Y.U. L. Rev. 383 (1964). In either case, the court fashions such law as is "necessary to protect uniquely federal interests" because it reasons that this is necessary to achieve the statutory or constitutional purpose. Thus, properly speaking, the privilege is not a "common law" one, but one which has its roots in some federal constitutional or statutory provision.

This court has not hesitated to fashion privileges where necessary to implement the arms of federal statutory or constitutional provisions. In *Barr* v. *Mateo,* 360 U.S. 564, the court recognized that certain otherwise tortious conduct of federal officials was privileged, so long as it fell "within the outer perimeter of their duties." See also *Pierson* v. *Rey,* 386 U.S. 547 (privilege for state officials). See also *Bivens* v. *Six Unnamed Narcotics Agents,* —— F.2d —— (2 Cir. 1972), 40 L.W. 2608, on remand from 403 U.S. 388. *Tenney* v. *Brandhove,* 341 U.S. 367 is particularly relevant here. There this court relied very heavily on the policies behind the speech and debate clause to hold that 42 U.S.C. § 1983, must be read to recognize a common law privilege for action taken by state legislators. The court fashioned the privilege because its existence would be

[27] As Professor Hill observes: "the federal courts may make substantive law only in effectuation of a policy derived from the constitution or from a valid act of congress." Hill, *The Erie Doctrine in Bankruptcy,* 66 Harv. L. Rev. 1013, 1050.

"related to the presuppositions of our legal history" (id. at 372).

We urge the court to follow *Tenney* here. We submit that in the absence of express congressional action, this court should hold that a private party performing acts similar or analogous to congressional employees on behalf of a United States senator — at least if the private party publishes documents placed before congress — is privileged *to the same extent that action by the federal employees themselves would be privileged under the speech and debate clause.* Recognition of such a privilege is particularly appropriate because it would reflect the complexity of modern government and acknowledge that a United States senator may utilize private parties as well as congressional employees in the discharge of his functions. And in the case of either employees or private parties their conduct is presumptively protected. *Dombrowski* v. *Eastland,* 387 U.S. 82, 85.

Conclusion

In No. 71-1026 the judgment should be affirmed.

In No. 71-1017 the judgment should be reversed with directions to the court of appeals to prohibit any interrogation of Senator Gravel or those with whom he dealt in publication of the Pentagon Papers.

Respectfully submitted,

HENRY PAUL MONAGHAN
765 Commonwealth Ave.
Boston, Massachusetts

FRANK B. FREDERICK
WILLIAM B. DUFFY, JR.
JOHNSON, CLAPP, STONE & JONES
One Boston Place
Boston, Massachusetts 02108